IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 889 of 1984
with
FIRST APPEAL No 1118 of 1984
with
CIVIL REVISION APPLICATION No 1200 of 2000

with
CIVIL APPLICATION No 5478 of 2002
with
CIVIL APPLICATION No 1477 of 2002
with
CIVIL APPLICATION No 2915 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAVJIBHAI MATHURBHAI SOLANKI DECD.THROUGH HIS HEIRS & L.RS:
Versus
BIJALBHAI DEVJIBHAI PRAJAPATI

Appearance:
1. First Appeal No. 889 of 1984
MR RA PATEL for Petitioner No. 1,9-8,10-8
MR HM PARIKH for Petitioner No. 1/1-1/2,1/3/A-1/3/B,
1/4/A-1/4/D,1/5/A-1/5/E,1/6/A-1/6/B,2,3,4

..... for Petitioner No. 1/3,1/4,1/5,1/6
MR RN SHAH for Petitioner No. 2,3,4-8,9-8,10
MR RA PATEL for Respondent No. 1
MR MB FAROOQUI for Respondent No. 2
NOTICE SERVED for Respondent No. 3
MR SURESH M SHAH for Respondent No. 4
MR MEHUL S SHAH for Respondent No. 4
MR AJ PATEL for Respondent No. 5-9

2. First Appeal No. 1118 of 1984
MR SHIRISH JOSHI for Petitioner No. 1
MR MB FAROOQUI for Respondent No. 1

3. Civil Revision Application No. 1200 of 2000
MR MB GANDHI for Petitioner
MR RN SHAH & MR. SHIRISHBHAI J. JOSHI for
contesting Respondents.

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 04/09/2003

CAV COMMON JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. The aforesaid First Appeals are filed by the original defendants. First Appeal No. 889 of 1984 has been filed by original defendants nos. 1, 7, 8, 9, 10, 11, 12, 13, 14 and 15; whereas First Appeal No. 1118 of 1984 has been filed by original defendants nos. 16, 17, 18 and 19. These appeals have been filed by them for challenging the judgment and decree dated 27th March, 1984 passed by the learned 3rd Joint Civil Judge [S.D.] Nadiad in Special Civil Suit No. 15 of 1982 allowing the suit of the original plaintiffs and passing the decree of specific performance directing original defendants nos. 1, 2, 3 and 6 to execute sale deeds in favour of original plaintiffs upon their paying the balance amount of Rs.3,37,800/=.

1.1. The Civil Revision Application (for short 'CRA') has been filed by original plaintiff no. 2 against the order passed by the learned Civil Judge [S.D.] Anand in Special Execution Petition No. 28 of 2000 seeking execution against the original defendants of this case in respect of the aforesaid judgment and decree. The order impugned in the Civil Revision

Application is dated 9/11/2000.

1.2. Since the appeals and the CRA arise from the same proceedings, they were heard together and they are now being disposed of by this common judgment.

1.3. For the sake of convenience, the parties are referred to in this judgment by their original position in the suit.

2. From the record of the case and in particular plaint, case of the plaintiffs appears to be that the original defendants nos. 1 and 2, namely Ravjibhai Mathurbhai Solanki and Gaguji Mathurbhai Solanki were brothers. They were the tenants of lands bearing survey nos. 2415/3 admeasuring A-0 Guntha-26 and survey no. 2415/2 admeasuring A-0 Guntha-25. Further defendant no. 2 was also tenant of land bearing survey no. 2416/1 admeasuring A-0 Guntha-22. These lands were new tenure and situated on the outskirts of Anand town. It is the say of the plaintiffs that by virtue of the provisions of the Bombay Agricultural Lands and Tenancy Act (for short 'Tenancy Act') the said defendants had become the owners of the said lands after paying the amount determined by the tenancy Court to the original owner of land and their names were accordingly entered into the revenue records. It is the further say of the plaintiffs that with the introduction of town planning scheme, these lands were covered under it and in place of these lands, the defendants were given the lands of old tenure, which were situated away from the aforesaid agricultural lands and which were numbered as Final Plot Nos. 432/2, 432 and 432/4. Defendants nos. 1 and 2 were put in actual possession of the final plots. Since the lands allotted to them under the scheme were slightly lesser than the lands held by them earlier, defendants have been paid compensation of Rs.40,000/=. It is the say of the plaintiffs that for survey no. 2415/3 admeasuring 24 Gunthas defendants were given final plot no. 432/2 admeasuring 2185-93-75 sq. mtrs., for land bearing survey no. 2416/1 admeasuring 22 Gunthas final plot no. 432/4 admeasuring 1037-50 sq. mtrs. and land bearing survey no. 2415/2 (29 Gunthas) final plot no. 432 were given to defendants nos. 1 and 2. The total land allotted to these defendants was 4843 sq. mtrs. The boundaries of these lands have been adequately described in the plaint.

2.1. It is the say of the plaintiffs that they have been dealing in the business of purchasing lands, plotting them and after developing the same by raising

construction, to sell them. Defendants nos. 1 and 2 had therefore, negotiated with them for the sale of aforesaid final plots and ultimately they decided to sell to the plaintiffs land admeasuring 4843-78-12 sq. mtrs. from final plot nos. 432/2, 432/4 and 432 and to retain 708-17-16 sq. mtrs. for themselves. The purchase price was fixed at Rs.4,10,000/=. In view of this, a document of agreement to sell was executed by and between the plaintiffs and defendants nos. 1 and 2 on 24th March, 1980. It is the say of the plaintiffs that till the date of execution of the said document the plaintiffs had already paid to defendants nos. 1 and 2 a sum of Rs.27,000/= towards the part payment of consideration for the purchase of land. It was also agreed between the parties that the balance amount was to be paid upon defendants nos. 1 and 2 obtaining the title clearance certificate and the said amount was to be paid in installments as per the convenience of the plaintiffs. It is further averred by the plaintiffs that the agreement to sell was signed on behalf of defendant no. 2 by his power of attorney holder, Solanki Lakhabhai Mathurbhai, who also happened to be his real brother which was duly approved by defendant no. 2. It is further averred that towards the consideration for the purchase of land, the plaintiffs had paid to defendants nos. 1 and 2 and/or the power of attorney holder of defendant no. 2 different sums on different dates. The plaintiffs have also stated that prior to actual execution of the document there was an oral agreement entered into between the plaintiffs and defendants nos. 1 and 2 in respect of sale of the suit land whereby these defendants had agreed to sell the land at the rate of Rs.10,000/= per Guntha and the plaintiffs had paid a sum of Rs.8,000/= by cheque dated 25th March, 1979 but the cheque was withdrawn and cash amount was paid at the instance of defendants nos. 1 and 2 and thereafter, Rs.17,000/= on 25th February, 1980 and Rs.2,000/= on 24th March, 1980 in cash. Thus, according to the plaintiffs, at the time of execution of the agreement to sell on 24th March, 1980 they had already paid to defendants nos. 1 and 2 a sum of Rs.27,000/=. After the execution of the document the plaintiffs had paid Rs.27,200/= to defendant no. 1 between the period from 14th May, 1980 and 30th May, 1981 and to defendant no. 2 sum of Rs.18,000/= on different dates during the period from 27th June, 1980 till 11th June, 1981. Thus, according to the plaintiffs, they had paid to defendants nos. 1 and 2 a sum of Rs.72,200/= out of the total agreed price of Rs.4,10,000/=. The details of the payments made to defendants nos. 1 and 2 have been adequately described in the plaint. These details also show that on 30th May,

1981 amount of Rs.4,500/= was paid to Kalpana Medical Stores at the instance of defendant no. 1 and amount of Rs.3,000/= was paid to Gopalbhai Jivanbhai, the brick merchant also at the instance of defendant no. 1.

2.2. It is the say of the plaintiffs that due to the rise in the prices of lands defendants nos. 1 and 2 started having second thought regarding the agreement to sell the lands to present plaintiffs. They, therefore, made preparation to sell the lands to third parties and it had come to their knowledge that they had in fact negotiated with defendants nos. 3 to 6 for sale of the suit land by charging higher price. In view thereof, the plaintiffs had filed Civil Suit No. 314 of 1981 in the Court of the learned Civil Judge at Anand for permanent injunction against defendants nos. 1 and 2 restraining them from transferring the suit land to third parties. In the Civil Court at Anand the plaintiffs had also prayed for temporary injunction but the same was rejected by the Court and hence the plaintiffs had preferred appeal in the District Court at Nadiad, where they had been able to obtain order regarding maintenance of status-quo on 11th January, 1982. It is the say of the plaintiffs that despite the prohibitory orders operating against defendants nos. 1 and 2, they had actually sold land admeasuring 4 Gunthas forming part of final plot no. 432 by registered sale-deed dated 15th January, 1982 to defendant no. 3. Similarly defendants nos. 1 and 2 had also entered into contract for sale of the suit land with the defendants nos. 4, 5 and 6. In view of this, the plaintiffs had sought permission of the Civil Court at Anand to withdraw Suit No.314 of 1981 with a view to file suit for specific performance. The said suit was permitted to be withdrawn by the Anand Court vide order dated 22nd January, 1982. It is further averred by the plaintiffs that since the defendants had actually started disposing of the land defeating the rights of the plaintiffs, a public notice dated 8th September, 1981 was given in the local daily for information of the public at large not to purchase the said lands. It is the say of the plaintiffs that in fact to warn defendant no. 3 they had personally gone to the office of the Registrar and had specifically informed him about the litigation regarding these lands, but no heed was paid to their caution and agreement was entered into by him with defendants nos. 1 and 2.

2.3. According to the plaintiffs, when they had repeatedly contacted defendants nos. 1 and 2 and asked them not to sell lands to third parties and to sell lands to them i.e. the plaintiffs, they were approached

by defendants' advocate Mr. M.N. Bhalja, who told them that unless they paid the price at the rate of Rs.15,000/- per Guntha, the lands would not be sold to them. Thus, defendants nos. 1 and 2 had made their intention very clear of defeating the right of the plaintiffs arising under the agreement to sell and, therefore, they had no other alternative but to approach the Court and file a suit for specific performance of the contract. The plaintiffs averred that they were ready and willing to pay the balance amount to defendants nos. 1 and 2 and perform their part of the contract.

2.4. In the suit the plaintiffs prayed that a decree of specific performance be passed in their favour and the defendants nos. 1 and 2 be directed to perform their part of the contract and upon payment of balance amount of Rs.3,37,800/=, they should execute a sale deed in favour of the plaintiffs. It was also prayed that the defendants be directed to retain land admeasuring 505-84-05 sq. mtrs. from any part of the aforesaid final plots and the rest of the lands be handed over to the plaintiffs. In the alternative the plaintiffs prayed that in lieu of the suit lands, the defendants nos. 1 and 2 be directed to pay compensation of Rs.4,10,000/= together with interest at the rate of 18% p.a. from the date of filing of the suit to the plaintiffs. It appears that the last relief regarding payment of compensation has been deleted subsequently vide Exh. 75 dated 13th July, 1982.

2.5. Originally when the suit was filed defendants nos. 1 to 6 were joined as parties to the suit. However, during the pendency of the suit, on coming to know that the suit lands were sold to other persons by defendants nos. 1 and 2, the plaintiffs have joined, by amending the plaint, the purchasers of the suit land as defendants nos. 7 to 19. It also appears that defendants nos. 4 and 5 were deleted from the proceedings of the suit vide Exh. 268 and Exh. 71 dated 20th December, 1983 and 5th July, 1982 respectively.

3. The suit came to be resisted by the defendants. Defendant no. 1 filed his written statement at Exh. 30. It was contended by the defendant that the suit was false and that they had never executed any agreement of sale on 24th March, 1980 in favour of the plaintiffs. He also denied that till the time the document was executed, the plaintiffs had already paid a sum of Rs.27,000/=. He had further denied that there was any oral contract entered into between the plaintiffs and defendants nos. 1 and 2 whereby it was agreed to sell

the suit lands to them by defendants by charging price of Rs.10,000/= per Guntha. He had further contended that the entire story with regard to payments made on different dates and total amount of Rs.72,200/- having been paid to defendants nos. 1 and 2 or the power of attorney holder of defendant no. 2 was concocted and false and the receipts have been fabricated by committing forgery. It is further stated by defendant no. 1 that the document dated 24th March, 1980 purporting to be an agreement to sell is nothing but a glaring instance of forgery. According to him, the plaintiffs have fabricated these documents by forging the signatures of the defendants with a view to grab the property of defendants nos. 1 and 2. It is his say that so far payment of Rs.8,000/= is concerned, it was paid to the defendants to meet the expenses incurred by them for the litigations pending in revenue Court and this Court in respect of the suit land and it was also agreed by defendants nos. 1 and 2 to repay the said amount with interest. It is further stated that on 10th April, 1980 defendants have paid a sum of Rs.9,000/= i.e. Rs.8,000/= towards principal amount and Rs.1,000/= by way of interest to the plaintiffs, for which a writing was executed on the stamp paper of Rs.10/=. It was further stated that since the entire claim of the plaintiffs is based on a forged document, no reliefs can be granted to them. It was, therefore, prayed that the suit of the plaintiffs be dismissed with costs and they may be directed to pay compensation of Rs.3,000/= for causing unnecessary harassment to the defendants.

3.1. Defendant no. 2 has filed his written statement at Exh. 37 wherein he has denied that the suit land was old tenure land and not agricultural land. He has also denied any payment having been made by the plaintiffs and execution of document at Exh. 207. He has further stated that with a view to grab the land of defendants, the plaintiffs have created forged documents and they have filed a false suit.

3.2. So far defendants nos. 4 and 7 to 11 are concerned, they have filed written statement to the amended plaint as well as to the application at Exh. 128. They have denied the averments made in the plaint and have stated that the suit against them was not maintainable as they were the bonafide purchasers for value without notice. They have further stated that since the provisions of the Tenancy Act are applicable to the suit lands and since no permission as required u/S. 43/63 had been obtained before execution of document at Exh. 207, the transaction was ab-initio void and no

cause of action had arisen in favour of the plaintiffs. According to them, sub-plots bearing nos. 1, 2 and 3 of final plot no. 432 admeasuring about 12 Gunthas were sold to defendants nos. 7, 8 and 9 on 26th January, 1982 for sum of Rs.1,20,000/= and at that time there was no litigation pending between the parties nor there was any order of injunction operating in favour of the plaintiffs. It is further stated that on 21st December, 1981, defendants nos. 1 and 2 had sold land from final plot no. 432 admeasuring 21.5 Gunthas to defendants nos. 10 to 13 for Rs.2,40,551/=. The sale deeds have been duly executed and these defendants have now become the owners of the lands sold to them. They have, therefore, submitted that this suit could not be proceeded against them. They have denied the execution of documents of agreement to sell entered into between the plaintiffs and defendants nos. 1 and 2. They have, therefore, prayed that the suit be dismissed.

3.3. So far defendants nos. 10 and 11 are concerned, they have opposed the application submitted by the plaintiffs for maintaining status-quo. The said written statement is at Exh. 165. According to them, since on previous occasion the plaintiffs had given similar application which was not accepted by the Court and hence subsequent application for the said relief could not be entertained. Further that since the alleged deed of agreement to sell is against the provisions of section 43 of the Tenancy Act, there was no question of passing any decree for specific performance.

4. The trial Court, on completion of the pleadings, framed as many as 39 issues at Exh. 162.

5. During the course of the proceedings of the suit the plaintiffs have led evidence oral as well as documentary. In support of its case plaintiff no. 2 Ismail Gafurbhai Vora has entered the box and given evidence at Exh. 203. In the course of his deposition before the Court, he has also produced several documents including the Banakhat in question at Exh. 207. He has also produced the permission for sale obtained by defendants under the provisions of sections 43 and 63 of the Tenancy Act. Vide Exhs. 208 to 230 he has produced the receipts issued by the defendants nos. 1 and 2 and power of attorney holder of defendant no. 2 in token of the payment made to them on different dates towards the consideration of the sale of suit land to them by defendants. His evidence is completely in accordance with the averments made in the plaint, which have already been narrated above and the defendants have not been able

to dislodge them in the cross-examination.

5.1. Plaintiffs have also examined one Jashbhai Chaturbhai Patel at Exh. 215. The said witness is owner of Kalpana Medical Stores and he has been examined with a view to prove the payment of Rs.4,500/= by plaintiffs at the instance of defendants nos. 1 and 2. He has completely supported the case of plaintiffs and has stated that amount was paid to him towards outstanding bill for purchase of medicines for elder brother of defendants 1 and 2. The third witness of the plaintiff is Ranchhodbhai Chhaganbhai. He is the person who has purchased the stamp paper on which the Banakhat in question has been prepared and he has also attested the same as witness of the plaintiffs.

5.2. So far defendants are concerned, neither defendant no. 1 nor defendant no. 2 has chosen to enter the witness box and give evidence in support of their say.

5.3. So far defendant no. 8 is concerned, he has examined himself at Exh. 272. Defendant no. 9 and defendant no. 10 have also examined themselves at Exhs. 373 and 284 respectively. Lastly defendant no. 16 has examined himself at Exh. 289. These defendants have given evidence in support of their say that they are the bonafide purchasers of the suit land for consideration without notice. It may be noted here that though they have examined themselves to prove the fact regarding purchase of suit land by them, they have not produced any sale-deed in respect of the same, which according to them, was sold by defendants nos. 1 and 2 to them. Thus, they have chosen to rely upon their oral evidence alone.

5.4. So far defendants nos. 1 and 2 are concerned, though adequate opportunity was given to them to lead evidence, they did not take any step to do so, and ultimately the trial Court closed the evidence on their behalf. Later on, defendant no. 2 submitted an application at Exh. 281 to the Court to permit him to lead evidence and to examine himself at the trial, which was turned down by the learned Judge vide order dated 4/1/1984. Against the said order, the defendants and in particular defendant no. 2 did not choose to file any proceedings before the appropriate forum and thus said order has uptill now remained unchallenged.

6. At the end of the trial, the learned Judge decreed the suit of the plaintiffs and directed the

plaintiffs to pay the remaining consideration of Rs.3,37,800/= to defendants nos. 1 and 2 and on payment of such amount to them, defendant nos. 1 and 2 and defendants nos. 3, 6 to 19 to execute sale-deeds in favour of the plaintiffs in respect of the suit land. It was also decreed by the learned Judge that in the event of defendants failing to execute the sale-deeds, the Court shall execute the sale-deeds on their behalf in favour of the plaintiffs through a Court Commissioner towards the execution of this decree and put the plaintiffs in possession of the suit land.

7. It is this judgment and decree, which are now being challenged in these appeals by the original defendants. So far defendant no. 2 is concerned, he has not preferred any appeal against the aforesaid decree. However, he has been joined as respondent in First Appeal No. 1118 of 1984.

8. The Civil Revision Application is preferred by plaintiff no. 2 as already stated above. In the CRA he has prayed that the judgment and order dated 9th November, 2000 passed by the learned Jt. Civil Judge [S.D.] Anand below Exh. 1 in Execution Petition No. 28 of 2000 be quashed and set aside and to direct the respondents to execute the requisite sale-deeds in favour of the petitioner of the said CRA i.e. plaintiff no. 2. He has further prayed that in the event of said respondents failing to execute the sale-deeds, the Sale Commissioner be appointed to complete the said formality. It is to be mentioned here that both defendants i.e. defendants nos. 1 and 2 have expired during the pendency of the First Appeals. Defendant no. 1 - Ravjibhai Mathurbhai has expired on 20th October, 1998; whereas defendant no. 2 - Gagujibhai Mathurbhai has expired on 20th July, 1988. (As per the affidavits filed by his heirs, the date is 4th March, 1990). Their heirs and legal representatives have been duly brought on record of these appeals. It is also borne out from the record that in the year 1991 the heirs of defendant no. 2 and defendant no. 1 Ravjibhai himself have executed sale-deeds of most of the lands comprising the suit land. Mr. M.B. Gandhi, the learned advocate appearing for plaintiff no. 1 in the aforesaid Civil Revision Application has produced a compilation comprising copies of different documents including affidavits of Defendant no. 1 and heirs and legal representatives of defendant no. 2 and various sale-deeds which have been executed by them in favour of plaintiff no. 2, which have come into existence during pendency of the First Appeals and which now form part of the record.

From affidavit filed by Ravjibhai Mathurbhai Solanki in First Appeal No. 889 of 1984 in the month of September 1991, it appears that on Civil Application No. 2616 of 1984 filed by him and other appellants of that appeal, this Court had passed order staying the execution of specific performance of the contract. However, the same was vacated by this Court in view of Civil Application No. 877 of 1988 filed by respondents no. 1 and 2 of the appeal i.e. plaintiffs nos. 1 and 2. The orders referred to above were in respect of lands bearing final plot no. 432 and 432/2. In view of vacation of the stay order, Ravjibhai and plaintiffs decided to complete the transaction. Pursuant to said decision following transactions of sale were completed by the parties by executing sale-deeds in respect of F.P. No. 432 and 432/2. The details are :-

(1) T.P. Scheme No. 1, F.P. No. 432, Admeasuring 405.24.00 sq. mtrs., Amount Rs.40,000/= dtd. 1st October, 1991
(2) T.P. Scheme No. 1, F.P. No. 432, Admeasuring 405.14.50 sq. mtrs., Amount Rs.40,000/= dtd. 1st October, 1991
(3) T.P. Scheme No. 1, F.P. No. 432, Admeasuring 405.02.00 sq. mtrs., Amount Rs.40,000/= dtd. 5th October, 1991
(4) T.P. Scheme No. 1, F.P. No. 432/2, Admeasuring 668.43.32 sq. mtrs., Amount Rs.70,000/= dtd. 1st October, 1991
(5) T.P. Scheme No. 1, F.P. No. 432/2, Admeasuring 607.00.00 sq. mtrs., Amount Rs.60,000/= dtd. 1st October, 1991.

It may be noted here that appellant no. 10 of this appeal viz. Rameshbhai Ravjibhai Solanki is one of the attesting witnesses of these documents.

It may also be noted here that Ravjibhai had sold sub-plot no. 4 of F.P. No. 432 to defendant no. 3 Bhikhabhai Khetabhai Prajapati by sale-deed dated 15th January, 1982. Despite decree, defendant no. 3 did not execute the sale-deed in favour of plaintiffs. Hence, plaintiff no. 2 filed execution proceedings wherein permission to execute the decree was granted. Even thereafter defendant no. 3 did not comply with it. Hence, Court Commissioner executed sale-deed in favour of plaintiff no. 2 on 13th November, 1998. Its details are -

T.P. Scheme No. 1, F.P. No. 432, Admeasuring 404.93.87 sq. mtrs., Amount Rs.40,000/= dtd. 13th November, 1998.

Similarly heirs of deceased Gagujibhai Mathurbhai Solanki have also executed sale-deeds in favour of plaintiff no. 2 for various sub-plots of F.P. No. 432/4. The details as as under :-

(1) T.P. Scheme No. 1, F.P. No. 432-4 (Northern portion), Admeasuring 531.50 sq. mtrs., Amount Rs.50,000/= dtd. 14th October, 1991.
(2) T.P. Scheme No. 1, F.P. No. 432-4 (Southern portion), Admeasuring 506.00 sq. mtrs., Amount Rs.50,000/= dtd. 1st November, 1991.

Thus, it can be seen that for major portion of the suit land, sale-deeds have been executed and plaintiff no. 2 has been put in possession of it. The land, which remains to be passed on to the plaintiffs by way of execution of the sale-deeds, is a small piece of land forming part of Final Plot No. 432/2 admeasuring 910 sq. mtrs., which is still in possession of defendants nos. 6 to 19. This shows that so far original defendants nos. 1 and 2 are concerned, they are now totally out of the picture as they have already executed the sale-deeds in respect of the land in their possession and they are no more in this world. In fact Defendant no. 1 Ravjibhai has declared in aforesaid affidavit that he did not intend to prosecute the First Appeal No. 889/1984.

9. We have heard Mr. H.M. Parikh, learned advocate appearing for the appellants of First Appeal No. 889 of 1984 and Mr. Shirishbhai Joshi, learned advocate appearing for appellants in First Appeal No. 1118 of 1984 and Mr. R.N. Shah, learned advocate appearing for defendants nos. 8,9 and 10, who are also being represented by Mr. H.M. Parikh in First Appeal No. 889 of 1984. In both these appeals Mr. M.B. Farooqi, learned advocate has appeared for the original plaintiff no. 2, who is respondent no. 1 in both these appeals. So far original plaintiff no. 1 is concerned, he has already relinquished his rights in the decree in favour of plaintiff no. 2 and has retired from the proceedings. So far CRA is concerned, we have heard Mr. M.B. Gandhi, learned advocate appearing for the petitioner and Mr. R.N. Shah and Mr. Shirishbhai Joshi, learned advocates appearing for the contesting respondents. Some of the respondents, though served, have chosen not to remain present.

10. Mr. H.M. Parikh has broadly advanced the following submissions :-

10.1. He has submitted that the entire suit is based on the forged document i.e. Exh. 207 and, therefore, no decree of specific performance of the contract can be passed in favour of the plaintiffs. He has advanced several circumstances, which according to him, would substantiate his say regarding the forgery of the document. We will deal with the same at the time when we discuss this submission in the course of the judgment. He has further submitted that even the receipts produced at Exhs. 208 to 230 are false and they have been fabricated by the plaintiffs to show that they have made part payment of the agreed consideration. He has further submitted that if the matter is closely scrutinised, it would clearly show that plaintiff no. 2, who also worked as consultant to defendant no. 2, has taken the disadvantage of his position and thereby he has tried to usurp the land by creating a forged document. He has also submitted that the story of plaintiffs having made payment of different amounts on different dates, which have been detailed out in the plaint, is totally false. According to him, Rs.8,000/= was paid by plaintiffs in the year 1979 to defendants for meeting the expenses incurred by them in the litigations pertaining to the agricultural lands held by them in the revenue Court and this Court. That amount was borrowed by defendants nos. 1 and 2 on the specific understanding that they would have to pay interest thereon. Ultimately, the said amount has been repaid together with interest. He has also submitted that originally the document in question was executed by 3 persons on the side of the plaintiffs i.e. plaintiffs nos. 1 and 2 and one Kiritbhai Vyas, whose name has been deleted from the document on the next day. No decree of specific performance, therefore, can be granted in favour of the plaintiffs on such altered document. According to Mr. Parikh, the plaintiffs had filed Regular Civil Suit No. 314 of 1981, which was subsequently withdrawn with the permission of the Court. However, the subsequent suit has not been filed in compliance with the condition imposed by the Civil Court while permitting the withdrawal of earlier suit. Hence, the present suit is barred by the provisions of Order 2 Rule 2 of the Code of Civil Procedure. He has submitted that the lands in question were new tenure lands and, therefore, before entering into any transaction of sale, permission of the Collector was required to be obtained, which in the present case has not been obtained and, therefore, it is against the provisions of section 43 of the Tenancy Act. The agreement, therefore, would be in contravention of section 23 of the Indian Contract Act. Similarly, in respect of the suit land, at the time the document in

question Exh. 207 was executed, no permission as required under Sections 43 and 63 of the Tenancy Act was obtained and, therefore, also the transaction was in contravention of section 23 of the Indian Contract Act. He has submitted that evidence of plaintiff no. 2 shows that there was partnership between plaintiff no. 1 and plaintiff no. 2. However, partnership is not registered and no suit can be entertained at the instance of unregistered partnership. Finally he has submitted that the trial Court had wrongly closed the evidence of defendants nos. 1 and 2. Moreover, defendant no. 2 had submitted application at Exh. 281 seeking permission to lead the evidence was not at all at a belated stage. Therefore, it ought to have been granted by the trial Court to enable him to substantiate his case by leading cogent evidence. By rejection of the said application by the trial Court grave prejudice has been caused to defendants nos. 1 and 2. He, therefore, submitted that even though the said order of rejection was not challenged in Revision Application before this Court, the appellants were entitled to agitate this question in appeal in view of the provisions of section 105 read with section 107 of the Code of Civil Procedure and this Court may redress the grievance of the appellants by remanding the matter to the trial Court to enable defendants nos. 1 and 2 to lead evidence. According to him, this appeal is, therefore, required to be allowed and the judgment and decree passed by the trial Court deserve to be quashed and set aside.

10.2. Mr. Shirish Joshi and Mr. R.N. Shah, learned advocates for third party purchasers, while adopting the submissions made by Mr. H.M. Parikh, have further submitted that there is nothing on record to show that they had any notice about the alleged transaction between the plaintiffs and defendants nos. 1 and 2 nor any notice about any litigation existing between the said parties and hence they were bonafide purchasers for consideration without notice. They have also submitted that the so called public notice issued in Gujarati daily called 'Charotar Bhoomi' is having very scanty circulation and no importance can be attached to such publication of the notice. They have further submitted that since no definite portion of the land has been described in the decree, the execution of the decree is not possible. They have, therefore, submitted that the decree directing them to execute sale-deeds in favour of the plaintiffs be quashed and set aside.

10.3. As against that, Mr. M.B. Farooqui, learned advocate appearing for plaintiff no. 2 has

supported the judgment and decree passed by the trial Court in toto and has further submitted that the plaintiffs have amply proved their case by leading cogent and reliable evidence and has adequately established the genuineness of document Exh. 207. According to him, the trial Court was fully justified in passing the decree of specific performance of the contract requiring defendants nos. 1 and 2 to perform their part of the contract. He has submitted that there is no substance in these appeals and, therefore, they are required to be dismissed.

11. Before we enter upon the discussion of the rival contentions, we may state that original defendants nos. 1 and 2 have already expired as stated above. So far defendant no. 2 is concerned, no appeal has been preferred by him. Not only that but in the year 1991 the execution of the sale-deed as per the decree of the trial Court has also been done by the legal representatives of defendant no. 2 and by defendant no. 1 himself and since then plaintiff no. 2 has come into possession of most of the suit lands. Therefore, the contentions raised before us by Mr. Parikh have merely become academic. However, since they have been raised and vehemently argued, we propose to deal with them on merits also.

11.1. So far the first contention of Mr. Parikh regarding forgery of the document at Exh. 207 is concerned, he has drawn our attention to various documents contained in the record of the case. He has first focussed our attention on Exh. 207 itself and has tried to submit that this document is hand written and it has been prepared by plaintiff no. 2. He has also drawn our attention to the evidence of plaintiff no. 2 wherein it has been stated by him that normally the work of documentation of the transactions is not done by him but he gets it done through outside agency. Mr. Parikh, therefore, submitted that there is no need for plaintiff no. 2 to prepare this document. This contention cannot be accepted because plaintiff no. 2 has categorically stated in his evidence that because of the shortage of time, he had to do this work by himself. We do not find anything unusual. It is quite possible that plaintiff no. 2, who himself is in the business of developing the immovable properties, would be well versed in preparing documents and if he had done it on account of shortage of time, there was no reason to disbelieve him.

11.2. Mr. Parikh has further submitted that had the document been genuine, it would have contained the details of the land such as boundaries and the

precise land in respect of which the document has been executed. However, Mr. Parikh's submission cannot be accepted because the document clearly shows that it is in respect of land bearing final plot nos. 432, 432/2 and 432/4 and further that the measurement of the said lands is also mentioned in detail. Merely because the boundaries are not described, it does not mean that the document is fabricated. The very fact that subsequently defendant no. 1 and legal representatives of defendant no. 2 have executed sale-deeds in respect of these lands clearly show that the parties very well knew which land was to be given to plaintiffs in sale. We, therefore, cannot agree to the submission of Mr. Parikh on this count. Moreover, it has also been contended by plaintiffs that the choice to retain land for themselves was given to the defendants and hence there was no need to describe boundaries of the suit land.

11.3. It is submitted by Mr. Parikh that Exh. 207 originally appears to have been written in the name of the present plaintiffs and Kiritbhai Vyas, but name of Kiritbhai Vyas is scored off and that also creates doubt regarding the genuineness of the document. The plaintiff no. 2 in his evidence has stated in no uncertain term the cause of deleting name of Kiritbhai Vyas. He has stated that because on the next day of the execution of the document Kiritbhai had expressed his inability to contribute necessary finance for the purchase of the land and had requested to drop him from the transaction, they had permitted him to retire and accordingly, from the document his name was scored off. Except for some halfhearted attempt, no substantial effort has been made by the defendants to challenge this fact while cross-examining plaintiff no. 2. For this reason also the veracity of document at Exh. 207 cannot be doubted.

11.4. Further Mr. Parikh has drawn our attention to various permissions granted by the Collector u/S. 43/63 of the Tenancy Act in pursuance of the applications made by the defendants and has tried to contend that these applications have been made subsequent to the date of execution of the alleged Banakhat; further that the permissions have been granted in the month of November 1981 and, therefore, till such time there was no question of entering into any transaction of agreement to sell with plaintiffs. He has further submitted that Exh. 233, which is also a permission granted by the Collector u/S. 43/63 of the Tenancy Act dated 22nd January, 1982 shows that the name of the proposed purchaser was shown as Dhirubhai Kalidas Mistry and others and the copy of the permission has been forwarded to defendant no. 2 as

also to Dhirubhai Kalidas Mistry, Sureshbhai Prajapati and Mahendrabhai Dayabhai Patel, who are defendants nos. 18, 6 and 17 respectively in the suit. He has, therefore, submitted that when the suit land was intended to be sold to these defendants, there was no question of entering into any agreement with plaintiffs for sale of the same and the document at Exh. 207 becomes doubtful. This submission also cannot be accepted, firstly for the reason that so far applications at Exhs. 231 and 232 are concerned, the permissions have been granted by the Collector pursuant to the applications made by defendant no. 1. In these permissions name of none of the defendants is mentioned as proposed purchaser, meaning thereby that applications might have been made in view of agreement at Exh. 207. So far Exh. 233 is concerned, application for permission has been made on 21st November, 1981. By that time defendants nos. 1 and 2 had already decided to frustrate the rights of the plaintiffs and to sell suit land to third parties by charging higher consideration in view of the escalation of prices in the business of real estate. It may also be noted that apprehending the transfer of land to third parties by sale, the plaintiffs even had filed suit for injunction, namely Regular Civil Suit No. 314 of 1981 on 24th August, 1981. When the intention of defendants nos. 1 and 2 was to defeat the rights of the plaintiffs, naturally in the application names of third parties would be mentioned as proposed purchasers. Therefore, there is no reason for us to come to the conclusion that document at Exh. 207 is forged one.

11.5. The second limb of Mr. Parikh's submission is that so far the litigation pertaining to the agricultural lands bearing survey nos. 2415/3, 2415/2 and 2416/1 going on between the original landlord and tenants i.e. defendants nos. 1 and 2 ultimately terminated in favour of the plaintiffs only with the judgment of this Court rendered in the Letters Patent Appeal No. 86 of 1979 with Letters Patent Appeal No. 106 of 1979 dated 16th November, 1980. He, therefore, submitted that the tenants i.e. defendants nos. 1 and 2's right to purchase the land has been crystallized only on that day. In the circumstances, document at Exh. 207 could not contain details regarding final plots. This submission of Mr. Parikh cannot be accepted because Exh. 231, which is permission granted by the Collector u/S. 43/63 of the Tenancy Act, clearly shows that it is granted in pursuance of application based under that section by defendant no. 1 on 16th July, 1980 wherein it has been stated that the said land is already included in the T.P. Scheme and the surrounding area of that land

was residential area. It is, therefore, clear that even before the judgment of this Court in the Letters Patent Appeal, the defendants nos. 1 and 2 were occupiers of the land in question and in that capacity they had submitted applications u/S. 43/63 of the Tenancy Act. If that be so, it can safely be inferred that they had entered into agreement to sell with plaintiffs. So far the evidence of plaintiff no. 2 is concerned, he has categorically stated that the T.P. Scheme was in existence since long and the present land bearing final plots were given to defendants nos. 1 and 2 in lieu of their original survey numbers mentioned above. Defendants have neither challenged this fact in the cross-examination of plaintiff no. 2 nor either of the defendants has chosen to enter the witness box and give evidence refuting this fact. Further that even in the written statements contention of the plaintiffs that lands bearing final plots were given to defendants nos. 1 and 2 in lieu of their agricultural land is not controverted. There is nothing on record to show that the final plots were determined at a later point of time i.e. subsequent to execution of agreement for sale dated 24th March, 1980. It is interesting to note at this juncture that the defendant no. 1 in his written statement at Exh. 30 in para. 6 has stated that after succeeding in this Court i.e. this High Court, the aforesaid lands i.e. final plots nos. 432 and 432/2 were agreed to be sold to third parties vide Banakhat dated 10th December, 1979. In the beginning of the said para. it has been stated that about 20 years prior to the date of filing of the written statement disputes regarding lands bearing final plots nos. 432 and 432/2 were going on in the Courts of Mamlatdar, Deputy Collector and also Gujarat Revenue Tribunal and this Court. It has been further stated in the said para. that plaintiffs were informed about the agreement to sell dated 10/12/1979 and, therefore, they got the idea to purchase this land and insisted that it should be sold to them and when defendant no. 1 denied to do so, document dated 24th March, 1980 was first executed. Thus, it is the case of defendant no. 1 himself that the numbering of the final plottings was already done and on 10th December, 1979 a document of agreement to sell was executed in favour of third parties. It, therefore, does not lie in the mouth of counsel for defendants to submit that the document at Exh. 207 is forged document because it mentions the numbers of final plots.

12. So far submissions of Mr. Parikh challenging the veracity of document Exh. 207 on the ground that the interpolations and forgery of the

signatures of defendant no. 1 and power of attorney holder of defendant no. 2 have been made and that even when defendant no. 2 was present, he has not signed the document, etc. are concerned, we are not at all impressed by the same because plaintiff no. 2 has entered the witness box and has given evidence on oath wherein he has stated facts regarding execution of document by defendant no. 1 and defendant no. 2 through his power of attorney holder. Not only that, he has also examined Ranchhodbhai Chhaganbhai at Exh. 266, who has confirmed the fact of the execution of the document by defendant no. 1 and power of attorney holder of defendant no. 2 on his behalf i.e. defendant no. 2. Ranchhodbhai is the person who has purchased the stamp on which Exh. 207 has been executed. Perusal of Exh. 207 would show that the same has been purchased by Ranchhodbhai Chhaganbhai on behalf of Bijalbhai Devjibhai i.e. plaintiff no. 1 on 21st March, 1980. This document also shows the name of attesting witness and at serial no. 1 this witness has appended his signature. Thus, this document has been executed in the presence of Ranchhodbhai. He states in his evidence that Exh. 207 was signed by other persons in his presence. He has also stated that he knew defendants nos. 1 and 2 as they were staying in his neighbourhood. Evidence of both these witnesses, viz. plaintiff no. 2 and Ranchhodbhai Chhaganbhai is very clear that document was duly signed by defendant no. 1 and power of attorney holder of defendant no. 2 and plaintiffs nos. 1 and 2 and also by two attesting witnesses, one of them being Ranchhodbhai Chhaganbhai. As against this, neither defendant no. 1 nor defendant no. 2 has entered into the witness box and given evidence challenging this fact. Not only that, no other witness has been examined by either of the two defendants to substantiate their say that the document was forged one. In absence of any challenge to the factum of execution of this document, it has to be accepted.

12.1. Thus, the effort on the part of Mr. Parikh, by advancing various circumstances noted above, to establish that the document in question i.e. Exh. 207 is forged and concocted one, fails hopelessly and we come to the conclusion that it is a genuine document and it has been executed by the parties thereto on the date and at the place stated therein.

12.2. Here we may also deal with similar contention raised by Mr. Parikh in respect of the money receipts produced at Exh. 208 to Exh. 230 by plaintiff no. 2 evidencing payment of various amounts to

defendants. According to Mr. Parikh all these receipts are forged and no reliance can be placed on them. We fail to understand on what basis such argument has been advanced by Mr. Parikh. No averment regarding the receipts being forged ones is made in any of the written statements, nor any questions on this line have been put to plaintiff no. 2 in his cross-examination. The persons who could have disputed these receipts on the ground of forgery viz. defendants no. 1 and 2 have not examined themselves in the proceedings. These receipts are duly signed by defendant no. 1 and/or power of attorney holder of defendant no. 2. there is no apparent reason to hold them forged. In fact, plaintiffs have examined Jashbhai Chaturbhai Patel at Exh. 215, the owner of Kalpana Medical Stores. He has supported the version of the plaintiff by stating in the evidence that plaintiffs had paid a sum of Rs.4500/= to him at the instance of defendant no. 1 and that too in his presence. This payment was made to clear outstanding bill in respect of purchase of medicines for Punambhai Mathurbhai i.e. brother of defendant nos. 1 and 2. We, therefore, do not accept this submission of Mr. Parikh.

13. This brings us to the next submission made by Mr. Parikh that the concerned defendants i.e. 1 and 2 had made application for permitting them to lead evidence as the same had been closed by the learned trial Court vide order dated 4/1/1984 and the same was wrongly rejected depriving the said defendants of their valuable rights to lead evidence. He has further submitted that the application was not given at the belated stage and it ought to have been granted in the interest of justice.

13.1. It is true that since defendants nos. 1 and 2 did not lead the evidence on the day fixed for the same, their right to lead evidence was closed and it is also true that at a later stage application seeking permission to lead evidence was submitted, but it was turned down. However, it appears that against the order of rejection of the said application no further steps have been taken by defendants nos. 1 and 2 by challenging the same before the higher forum and during the pendency of the suit it has been allowed to remain as it is. Mr. Parikh has submitted that he is entitled to even at the stage of appeal to contend that the said order was wrong and matter could be remanded permitting defendants nos. 1 and 2 to lead evidence. We cannot accept this submission of Mr. Parikh for the reasons that nothing had prevented defendants nos. 1 and 2 from leading evidence at the appropriate time i.e. at the time when the trial Court had granted them the

opportunity to do so. Further that when their application for permitting them to lead evidence was rejected by the trial Court on the ground that at a belated stage defendants nos. 1 and 2 cannot be allowed to lead evidence and be given opportunity to plucg the loopholes in their case, no proceedings challenging the said order were filed immediately before the higher forum and the things were allowed to remain as it is for all these years. The evidence of the parties was recorded during December 1983 and January 1984. The concerned defendants i.e. defendants nos. 1 and 2 ought to have approached the higher forum immediately and they ought to have got their right regarding leading evidence decided by the higher forum but the same has not been done at that time. After a lapse of more than 19 years it would not be worthwhile to remand the case to the trial Court for permitting the defendants to lead evidence, particularly when both the original defendants i.e. defendants nos. 1 and 2 have already expired long back who alone could have disputed the execution of document at Exh. 207. There is also nothing on record to show what is the position of power of attorney holder of original defendant no. 2. Further that in response to the decree passed by the trial Court defendants nos. 1 and 2 have already executed the sale-deeds in respect of most of the suit land in the year 1991 and plaintiff no. 2 has already taken possession thereof by paying the agreed consideration. Moreover, as stated above, defendant no. 2 has not preferred any appeal whereas defendant no. 1 by filing affidavit has declared that he did not intend to prosecute his appeal. It is, therefore, very clear to us that no useful purpose will be served by remanding the case to the trial Court. We, therefore, do not accept this contention of Mr. Parikh.

14. Mr. Parikh has further contended that plaintiffs nos. 1 and 2 had previously filed suit being Regular Civil Suit No. 314 of 1981 for permanent injunction restraining defendants nos. 1 and 2 from transferring the suit land in favour of third parties. The said suit was withdrawn and thereafter the present suit was filed for specific performance of the contract on the strength of Exh. 207. He, therefore, submits that the subsequent suit i.e. the present suit is barred by the provisions of Order 2 Rule 2 of the Code of Civil Procedure, as plaintiffs could have incorporated relief for specific performance of the contract in the previous suit itself.

14.1. If we peruse application at Exh. 23 submitted by plaintiffs under Order 23 Rule 1 of Code of

Civil Procedure in Regular Civil Suit No. 314 of 1981, which is also brought on record of this case at Exh. 245, it is dated 22nd January, 1982, it is stated by the plaintiffs that defendants have executed a document regarding agreement for sale of the suit land for Rs.4,10,000/= on 24th March, 1980 and plaintiffs have paid to defendants Rs.72,200/= as part payment of the agreed consideration. However, because of the rise in the prices of land in Anand town, the plaintiffs were making efforts to sell lands to third parties by charging higher consideration and, therefore, the present suit i.e. R.C.S. No. 314 of 1981 was required to be filed for restraining them from transferring the suit land. It is stated in para. 2 of the said application that the defendants have raised dispute in written statement that the suit was not maintainable in the Court of the Civil Judge [Junior Division] at Anand as the land was valued at more than Rs.20,000/= and that the suit was premature. In para. 3 it has been stated that in view of the disputes raised in law by defendants and also on facts it was quite likely that on account of technical defects their suit may fail and further that looking to the conduct of the defendants and the replies filed by the defendants, it was clear that sooner or later plaintiffs would be required to file suit for specific performance. Hence, the permission to file fresh suit for the said suit property be granted to them and this suit be allowed to be withdrawn. It also bears endorsement of learned advocate for the defendants which is reproduced as under :-

"I strongly object. Full cost should be awarded to us. Sd/- R.J. Bhalja, Advocate for defendants 22/1/82"

The Court has on the same day passed the following order:-

"Read.
Heard. It seems that plaintiffs' suit may fail on the ground that he has remedy of suit for specific performance of the contract. He has not resorted it. In the circumstances, I allow the plaintiffs to withdraw the suit with a condition to file a fresh suit on the same cause of action. No order as to costs.

Sd/- P.D. Gujarathi,
22/1/82
Civil Judge (J.D.) Anand."

This application as well as the order passed below it, if closely perused, clearly show that the plaintiffs had expressed their apprehension regarding failure of the suit on account of the defences raised by the defendants in their written statement in respect of the jurisdiction of that Court to entertain the suit as well as the suit being filed at a premature stage. The application also shows that the plaintiffs had all the reason/s to believe that sooner or later, they would be required to file suit for specific performance of the contract in view of the conduct and the replies of the defendants. The permission is, therefore, sought for filing fresh suit and withdrawal of the said suit in respect of the same suit property. Thus, it is clear that what plaintiffs had asked for was withdrawal of R.C.S. No. 314 of 1981 with a view to file suit for specific performance of the contract in relation to the same property. The order of the learned Judge shows that what appeared to the learned Judge was that the plaintiffs' suit might fail on the ground that they had remedy of suit for specific performance of the contract and that they had not resorted to the same and in those circumstances the plaintiffs were allowed to withdraw the previous suit with a condition to file fresh suit on the same cause of action. The cost was not awarded despite demanded by the learned advocate for defendants. It is, therefore, very clear that the plaintiffs had withdrawn the earlier suit with a permission to file fresh suit for the specific performance of the contract and the said permission was duly granted by the trial Court. In view thereof, we do not see how the provisions of Order 2 Rule 2 will come into operation as the provisions clearly provide for withdrawal of the earlier suit and filing of the fresh suit with the permission of the concerned Court. When such permission has been granted in this case, there is no question of operation of Order 2 Rule 2 of C.P.C.

14.2. The second limb of this argument as advanced by Mr. Parikh is that in earlier suit i.e. in R.C.S. No. 314 of 1981 the plaintiffs had made averment to the effect that cause of action had arisen on 22nd June, 1981; whereas in the present suit it has been mentioned that a cause of action has arisen on 24th March, 1981. The trial Court had permitted withdrawal of the earlier suit only on the condition that the subsequent suit would have to be on the basis of the same cause of action. According to Mr. Parikh, since the present suit is on different cause of action, it cannot be permitted in view of the aforesaid provisions of law.

14.3. We are totally at loss how such submission can be made. If the plaint of earlier suit which is also brought on record of this case at Exh. 246 is perused, it shows that the said suit was filed on account of apprehension entertained by the plaintiffs in view of the efforts made by defendants nos. 1 and 2 to sell the subject property of Exh. 207 to third parties. That was being done sometime in the month of June 1981 and in that view of the matter, only relief of permanent injunction was sought. However, the record clearly shows that during the pendency of the earlier suit the defendants nos. 1 and 2 in fact executed sale-deeds in favour of other defendants on different dates despite the prohibitory orders in existence against them. Due to such conduct of defendants, plaintiffs had sought permission to withdraw the earlier suit and it was allowed to be withdrawn by the learned Judge keeping these facts in view to enable the plaintiffs to file appropriate suit for specific performance of the contract. The main cause of action of both the proceedings was the effort of defendants nos. 1 and 2 to dispose of the land and subsequently actual disposal of the suit property in favour of the third parties. Obviously when suit for specific performance was to be filed, it had to be on the basis of the document for agreement to sell which is dated 24th March, 1980 and, therefore, there was nothing wrong on the part of plaintiffs to mention in the subsequent suit that the cause of action had arisen on 24th March, 1980. The subsequent suit is, therefore, maintainable and not bar of Order 2 Rule 2 of the C.P.C. come into effect.

14.4. If this situation is even viewed slightly from different angle, it would show that at the time when the earlier suit was filed to the knowledge of the plaintiffs, only efforts were made by defendants nos. 1 and 2 to dispose of their land in favour of third parties and, therefore, the plaintiffs merely apprehend that the defendants may defeat their right arising under agreement for sale at Exh. 207. Since that suit was filed on the basis of mere apprehension, the prayer for permanent injunction was sought. That was the precise reason that contention regarding the suit being premature was raised by defendants, most probably by advancing an argument that either the apprehension was not well founded or that there was nothing on record at that time regarding sale of suit property to third parties. It was during pendency of this suit the actual sale transactions are said to have taken place between the defendants nos. 1 and 2 and the other defendants and also at a stage after

the withdrawal of the earlier suit and before the filing of the present suit. In that view of the matter, the cause of action had changed and it had become the actual disposal of the land completely ignoring document at Exh. 207. Therefore, the plaintiffs were justifying in filing suit for specific performance. At the time when the earlier suit was filed, it can be said that the situation had not ripen for filing a suit for specific performance and the same could not have been entertained at that stage. In view of that, the only suit that could have been filed was for permanent injunction. The subsequent suit has been filed in view of the subsequent developments which have taken place despite the prohibitory orders in existence of the District Court at Nadiad. In view of that also provisions of Order 2 Rule 2 are not attracted.

14.5. Further in view of above discussion, submission of Mr. Parikh that plaintiffs ought to have filed suit for specific performance instead of suit for injunction and the delay caused in filing subsequent suit has created rights in favour of third parties cannot be accepted. In our opinion, there is no delay caused; nor any rights have been created in favour of third parties as can be seen from the discussion made hereinafter. Reliance placed by Mr. Parikh on decisions of the Apex Court have no relevance whatsoever in the present case and we decline to discuss them here. It may also be stated that in the trial, issue on the question of bar of Order 2 Rule 2 of Code of Civil Procedure was framed, but the defendants had given it up and not pressed it.

14.6. It is also very clear that when breach of agreement was actually committed by the defendants by executing sale-deeds in favour of third parties and hading over suit lands to them, suit for injunction would be a difficult proposition since efficacious remedy in the form of suit for specific performance would be available to the plaintiffs. For this reason also they are entitled to file present suit without provisions of clause (3) of Rule 2 of Order 2 of Code of Civil Procedure creating any hindrance for them. If any authority is needed on this point, it is reported in AIR 1925 Lahore p.459.

15. This brings us to the next submission of Mr. Parikh to the effect that the land in question were new tenure land and, therefore, before its sale the permission of the Collector was needed in view of the provisions of section 43 of the Tenancy Act and since the agreement to sell was without obtaining such permission,

the agreement was in contravention of section 23 of the Indian Contract Act. We cannot accept this submission of Mr. Parikh because in the evidence of plaintiff no. 2 as well as in the plaint it has been clearly stated that the land bearing survey nos. 2415/3, 2415/2and 2416/1 were agricultural lands and were new tenure lands. It has been further stated that since after the defendants nos. 1 and 2 became owners of the aforesaid agricultural lands, those lands got covered in the town planning scheme and, therefore, defendants, in lieu of those lands, were given another lands at a distance which were already given final plots nos. 432. 432/2 and 432/4. The said lands were of old tenure.

15.1. These facts have been reiterated by plaintiff no. 2 in his evidence. There is no challenge to this fact by the defendants either in the cross-examination of plaintiff no. 2 or in evidence to controvert these facts, has been made by them. Not only that but this part of the evidence of plaintiff no. 2 gets support from the evidence of Ranchhodbhai Chhaganbhai at Exh. 266, who clearly states that he had seen both the lands i.e. lands bearing final plots nos. as well as the original lands held and cultivated by defendants nos. 1 and 2. He has further stated that the original land held by plaintiffs was now a municipal open ground which has been named as Morarji Ground, whereas the lands in question bearing final T.P. plots nos. were situated near Kalpana Talkies on Bhalej Road. It is, therefore, very clear that the lands in question have already been given final plots nos. under the town planning scheme. It is not on record that such final plotting was done. However, some indication can be have from the written statement of defendant no. 1 that it was there since last 20 years from the date on which the written statement came to be filed. When the lands is of old tenure, permission of the Collector u/S. 43 of the Tenancy Act would not be required. Not only that but when it is already covered under the provisions of the Bombay Town Planning Act even by virtue of provisions of section 43 of the Tenancy Act, permission of the Collector would not be required for the same. As already stated above that there is no definite evidence on record as to on what date these lands were given final plot nos. In view of the aforesaid, we hold that the agreement dated 24th March, 1980 is not in contravention of provisions of section 23 of the Indian Contract Act.

16. The next submission of Mr. Parikh is that the document in question shows that originally there were 3 persons on the side of plaintiffs viz. plaintiffs

nos. 1 and 2 and one Kiritbhai Vyas and the document was executed in favour of those 3 persons. However, the document on record shows that name of Kiritbhai is scored off. Therefore, on the strength of such document, no decree for the specific performance of the contract can be passed, in particular when no consent of the otherside was taken. In support of his contention Mr. Parikh has also placed reliance on the decision of the Apex Court rendered in the case of Loonkaran Sethia v. Ivan E. John reported in AIR 1977 S.C. p. 336. We cannot accept this argument of Mr. Parikh solely because this cannot be said to be a material alteration vis-a-vis defendants. Plaintiff no. 2 in his evidence has stated that name of Kiritbhai was scored off from the document on the next day because he had expressed his inability to contribute his part of finance required for purchase of the suit land. Whatever the material effect of withdrawal of Kiritbhai from the transaction was there, it was on the plaintiffs because they would have to generate that part of the finance which Kiritbhai was required to make available. When plaintiffs were ready and willing to generate even that finance and fullfil their part of the obligation arising under the contract, defendants nos. 1 and 2 had no reason to be materially affected by such alteration. Secondly, the concerned defendants i.e. nos. 1 and 2 have not chosen to give evidence to show that before deleting the name of Kiritbhai their consent was not obtained. Even in the cross-examination of plaintiff no. 2, it has not been suggested that before scoring off the name of Kiritbhai, consent of defendants nos. 1 and 2 was not obtained. Thus, there was nothing on record to show that even while deleting the name, the concerned defendants were not informed. In the case of Loonkaran Sethia (supra) it has been held by the Apex Court that if the alteration (by erasure, interlineation or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party to or person entitled under it, but without the consent of the party or parties liable under it, the deed is rendered void from the time of the alteration so as to prevent the person who has made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound by it, who did not consent to the alteration, any obligation, convenant or promise thereby undertaken or made.

It has also explained that a material alteration is one which varies the rights, liabilities, or legal position of the parties, as ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to

certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed.

The aforesaid observations of the Apex Court do not at all help Mr. Parikh's submission, firstly because in our opinion vis-a-vis defendants nos. 1 and 2 it was not at all a material alteration and further it did not alter their rights or liabilities arising under the said document. Further that there was nothing on record to show that no consent was obtained of defendants nos. 1 and 2 before deleting the name of Kiritbhai. Mr. Parikh has also placed reliance on the decision of the Apex Court rendered in the case of Jahar Roy v. Premji Bhimji Mansata reported in AIR 1977 S.C. p.2439 and has submitted that Kiritbhai ought to have been joined as plaintiff or as proforma defendant and the plaintiffs having not done so, that was against provisions of section 45 of the Contract Act. We do not see any reason to accept the aforesaid submission of Mr. Parikh and in our opinion the aforesaid decision does not help defendants at all in view of the facts relating to deletion of Kiritbhai's name from the document. We, therefore, reject the submission of Mr. Parikh.

17. Lastly, it brings us to the contention of Mr. Parikh that present suit was maintainable in law because from the evidence of plaintiff no. 2, it appears that plaintiff nos. 1 and 2 had formed partnership, purchase the plot of land and sell it after development or in the same form to earn profit. When there was a partnership, it ought to have been a registered partnership and no suit can be filed by unregistered partnership in view of the provisions of the Partnership Act. This submission of Mr. Parikh is totally devoid of any merit. When it has been merely stated by the plaintiff no. 2 in evidence that if they get some profit, they might sell the land after purchase from original defendants nos. 1 and 2. On the basis of this alone it cannot be said that plaintiff nos. 1 and 2 had formed a partnership as envisaged under the Partnership Act. If the defendants want to assert the fact regarding partnership and to plead that for want of registration no suit was maintainable, it was incumbent upon them to prove that the partnership existed at the time when the transaction was entered into by plaintiffs nos. 1 and 2 on one side as a partnership firm and the defendants and that the present suit was being filed in the capacity of such partnership firm. No such contention has either been raised in the written statement nor any evidence has

been led by the defendants in that direction. It is only for the first time it has been sought to be agitated before this Court that the suit is not maintainable for want of registration. This is a mixed question of fact and law and when factual contentions required for this purpose are not raised at the earliest opportunity i.e. before the trial Court, no such contentions can be permitted to be raised in appeal. More so when no such foundation has even been made for such submission before the trial Court either in the form of averments made in the written statement or in the form of evidence before the Court. The said contention therefore, deserves to be rejected.

18. This brings us to the contentions raised by Mr. Shirish J. Joshi and Mr. R.N. Shah, learned advocates appearing for the other defendants, who are alleged to have purchased lands from original defendants nos. 1 and 2. Their main submission is that because they are bonafide purchasers for consideration without notice, they cannot be now called upon to surrender their lands to plaintiffs by executing sale-deeds in their favour. They have further contended that even the decree passed by the trial Court is not executable because the defendants do not know as to in respect of which land they are required to execute the sale-deeds as in the agreement dated 24th March, 1980, no description or demarcation of the boundaries have been made nor in the decree any indication is given about it. A faint attempt has also been made to show that the public notice issued by the plaintiffs in a Gujarat daily called "Charotar Bhoomi" cannot be taken into consideration because the said daily does not have wide circulation. These submissions of learned advocates cannot be accepted, firstly because except defendants nos. 8, 9, 10 and 16, no-one else entered the witness box and chosen to give evidence. Not only that but even the defendants who have given evidence have not chosen to produce the sale-deeds executed by defendants nos. 1 and 2 in their favour. Not a single document evidencing the sale in their favour has been produced by any of the subsequent purchasers. It is, therefore, difficult to accept their case. Even assuming that they had purchased the lands, there is ample evidence on record to show that the plaintiffs had taken adequate care to see that nobody should purchase the land without having any notice regarding the dispute pending between them and defendants nos. 1 and 2. They have informed the registration office. They have also taken steps to publish a public notice and they have also taken steps to serve the personal notices to persons whom they came to know that the alleged transactions have been

entered into by defendants nos. 1 and 2. Plaintiff no. 2's evidence amply proves this fact. He has even stated in his evidence that so far defendant no. 3 is concerned, plaintiffs had met him in the office of the registrar and informed him about the agreement at Exh. 207 in respect of land he was intending to purchase. This fact is also incorporated in the plaint. Thus, when all the required steps under the law have been taken by the plaintiffs, these defendants cannot be allowed to agitate a grievance that they were bonafide purchasers without notice. Moreover, from the record and in particular the evidence of the witnesses, it becomes doubtful whether they are bonafide purchasers. It appears that the transactions with regard to sale of land have taken place in respect of several defendants on the same day. It is highly improbable that on that day there would be a rush for purchase of the said land and on no other day. Not only that but had there been genuine registered sale-deeds, defendants would not have failed to produce the same before the Court to establish their own rights in the land. Nothing has been done by them. When the transactions are not found to be bonafide and when they are not found to be without notice, the sales in favour of these defendants cannot be approved and we are in agreement with the trial Court's conclusion arrived at on this count. We also conclude that the learned trial Court was completely justified in directing defendants nos. 1, 2 & 3 and 6 to 19 to execute the sale-deeds in favour of the plaintiffs.

19. The foregoing discussion clearly suggests that the defendants who want to cling to these lands any how, are fighting this litigation to frustrate the rights of plaintiffs arising under document at Exh. 207. When substantial part of the decree has been complied with by executing sale-deeds in favour of plaintiff no. 2, by defendants nos. 1 and 2 and when defendant no. 2 has even not cared to file appeal challenging the decree, it is very clear that so far those defendants were concerned, they had accepted the decree and complied with the same. The record also shows that the rest of the defendants have, with a view to defeat the rights of the plaintiffs, made a false show regarding sale and further sale of the suit lands in favour of various defendants. This is nothing but a fraud played by them with a view to defeat the legitimate right of plaintiff no. 2. In view thereof, we dismiss both these appeals and direct the defendants to bear their own cost and that of the plaintiff no. 2 of these appeals. In other words, the appellants of both these appeals are directed to bear the costs of respondent no. 1.

20. This brings us to the order challenged in the aforesaid Civil Revision Application. The record shows that original plaintiff no. 1 has relinquished his rights arising under the decree in favour of plaintiff no. 2 and he has moved out of the picture. Thus, plaintiff no. 2 alone is now interested in executing the decree. The learned Executing Court i.e. the Court of learned Civil Judge [S.D.] at Anand has turned down the application filed by plaintiff no. 2 as Special Execution Petition No. 28 of 2000. The order of the learned Judge shows one of the grounds on which it is rejected is that when co-decree holder is not joined as party in execution, the decree cannot be executed. However, this reasoning of the learned Judge is erroneous because when the joint decree holder, namely plaintiff no. 1 had relinquished his rights in the decree in favour of plaintiff no. 2 and there was ample evidence on record to show that now plaintiff no. 2 alone was interested in the decree. It is also on record that plaintiff no. 2 had filed appropriate affidavit before the trial Court intimating the relinquishment of right of plaintiff no. 1 in favour of plaintiff no. 2. Moreover, on the strength of the affidavit filed before this Court by plaintiff no. 1, he was deleted from all the proceedings pending before this Court. Thus, plaintiff no. 2 alone had right and interest in the decree and in accordance with Order 21 Rule 15 of Code of Civil Procedure, he was entitled to file application for execution of the decree and execution proceedings at his instance were maintainable.

21. It appears from the impugned order that the second ground on which the execution application has been rejected is that earlier, plaintiffs had filed Execution Petition No. 103 of 1988 which was subsequently given new number as Execution Petition No. 99 of 1989, which was withdrawn before the decree was satisfied or adjusted fully outside the Court. In that petition the Court had passed specific order to dispose of the execution in view of the pursis at Exh. 32 dated 26/11/1991 signed by plaintiff no. 2 and his advocate declaring that there was settlement between the parties and he did not intend to prosecute the execution proceedings and the same should be terminated. The Executing Court, therefore, in the present execution proceedings has held that plaintiff no. 2 had no right to initiate execution proceedings again for the same decree against the present defendants (i.e. defendants nos. 6 to 19).

21.1. It is true that the earlier execution proceedings in respect of the decree in question were withdrawn by plaintiff no. 2. However, perusal of record shows that the said pursis intimating settlement between the parties to the Court was filed in view of the fact that original defendant no. 1 and the heirs of defendant no. 2 who were the owners of the suit land had already executed sale-deeds in favour of plaintiff no. 2, details whereof have been duly stated in para. 8 of this judgment. The said proceedings were filed against the original defendants nos. 1 and 2 only. Since they had executed the sale-deeds there was no point in pursuing the said execution proceedings any further. In the circumstances, plaintiff no. 2 was obliged to file the aforesaid pursis. However, it is very clear that present defendants were not party to the said proceedings nor does the record show that there was any adjustment or settlement between the parties and the same was duly certified by the Court as required under rule 2 and rule 2A of Order 21 of the Code of Civil Procedure. It is, therefore, obvious that so far the remaining portion of the land undelivered to plaintiff no. 2 is concerned and which is in possession of defendants nos. 6 to 19, plaintiff no. 2 was well within his rights to get sale-deeds executed by them in view of the decree passed by the trial Court, particularly when consideration for the undelivered land also has already been paid way back in the year 1991. Further provisions of Order 23 of the Code of Civil Procedure dealing with withdrawal and adjustment of suits are referred to, rule 4 of the said order lays down that provisions of Order 23 shall not apply to any proceedings in execution of a decree or order. Moreover, it can be said that there is no decision on merits of the Court in earlier proceedings and the proceedings were simply withdrawn in view of the pursis submitted by plaintiff no. 2. The plaintiff no. 2 is, therefore, entitled to file present execution petition and reap the fruits of decree which has been passed in his favour about 19 years back.

21.2. It also appears from the impugned order that the third factor which has weighed with the learned Judge for rejecting the application is that plaintiff no. 2 had not joined the heirs and legal representatives of defendants nos. 1, 2, 10 and 18, who by then had expired. Again it may be noted here that original defendants nos. 1 and 2 had already executed sale-deeds in respect of land bearing final plot nos. 432, 432/2 and 432/4. The sale-deeds also show that appellant no. 10 of First Appeal No. 889/1984, namely Rameshbhai Ravjibhai Solanki, the son of appellant no. 1 deceased

Ravjibhai Solanki, who is original defendant no. 14, was attesting witness to these sale-deeds. He is also joined as party opponent no. 9 in Execution Petition. Similarly, appellant no. 9 (original defendant no. 15) of that appeal - Solanki Baldev Ravjibhai who is also son of appellant no. 1 Ravjibhai, the deceased, is joined as opponent no. 10 in the execution petition. Thus, the estate of deceased Ravjibhai is being represented by his sons. So far defendant no. 2 is concerned, his heirs have already executed sale-deeds in respect of land which was in their possession i.e. final plot no. 432/4 and they have handed over possession thereof to plaintiff no. 2. Only possession of part of final plot no. 432/2 has remained with the defendants. Further the order shows that the aforesaid sons of deceased Ravjibhai had raised objection that defendants nos. 1 and 2 have died on 20/7/1998 and 14/8/1988 respectively and, therefore, there was no question of execution of sale-deeds in favour of decree holders by said defendants. It is very unfortunate that despite having executed the registered sale-deeds in favour of plaintiff no. 2 such dishonest plea has been raised by these two defendants/opponents. Further if heirs of deceased defendants had remained to be brought on record, the decree holder ought to have been given reasonable chance to bring them on record and the learned Judge ought not to have refused the execution of decree solely on such technical ground, more particularly in view of the fact that plaintiff no. 2 had been fighting for his right to have the land almost for 19 to 20 years. In our view, the impugned order rejecting the aforesaid execution petition is wrongly passed. We, therefore, hereby quash and set aside the order of learned Joint Civil Judge [S.D.] Anand dated 9th November, 2000 below Exh. 1 in Special Execution Petition No. 28 of 2000 and remand the execution proceedings to the Court of learned Joint Civil Judge [S.D.] Anand for proceeding further with the said execution proceedings with a direction that it should be completed as expeditiously as possible and not later than 30th September, 2003.

21.3. Lastly, we may turn our attention to Civil Application No. 5478 of 2002 in First Appeal No. 889 of 1984 which has been filed for removing the encroachment from the suit land which has been caused by the encroachers at the instance of the appellants of that appeal. It is very clear that for the forgoing discussion, the encroachers have no right to remain on the suit land and no objection raised by such encroachers can be legally entertained. They are required to be removed from the land forthwith. We, therefore, direct

the Executing Court to take immediate steps to get the suit land cleared of such encroachment forthwith.

22. The ultimate result is that both the First Appeals i.e. First Appeal Nos. 889 of 1984 and 1118 of 1984 are dismissed with cost as already stated above. The Civil Revision Application No. 1200 of 2000 is allowed with no order as to costs and Civil Application No. 5478 of 2002 in First Appeal No. 889 of 1984 is granted.

As the First Appeals are dismissed and Civil Revision Application is allowed, the Civil Application Nos. 1477 of 2002 and 2915 of 2003 do not survive. Hence they are disposed of accordingly. Rule in Civil Application No. 2915 of 2003 is discharged.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.

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At this juncture Mr. H.M. Parikh and Mr. B.S. Joshi for Mr. S.J. Joshi for the appellants make a request that the status-quo be granted for a period of six weeks from today. This request cannot be accepted because the appeal is of the year 1984 and though respondent no. 1 has obtained decree about 20 years back, he has not been able to enjoy the fruits of it till this date. No useful purpose will be served now by granting the status-quo and extending the agony of the respondent no. 1 any further.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.